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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 460

WILLIAM J. CLEARY,

Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY,
a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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WILLIAM J. CLEARY,

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CHICAGO TITLE AND TRUST COMPANY,
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PETITION FOR WRIT OF CERTIORARI.

May It Please The Court:

The Petitioner, William J. Cleary, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of Illinois. In this petition the petitioner will be designated as Cleary and the respondent as the Trust Company.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Chicago Lumber Company in 1927 purchased real property from Cleary appraised at $185.000. Payment was to be made by $100,000 in bonds; fifty-one per cent of the stock of the corporation, and $10,000 in cash, (Tr. 986). The Trust Company was escrow depositary and trustee in the bonds of this corporation, receiving and transferring Cleary's property. It received a deposit of $200,000 in bonds and two-thirds of the stock of the lumber company. The Trust Company delivered bonds to others, and Cleary has received nothing. This proceeding is a counter-claim by Cleary of a suit for $481.80 filed against Cleary by the Trust Company for fees as escrow depositary. This suit, filed on May 12, 1932, was non-suited by motion of the Trust Company on April 16, 1934, (Tr. 1; 50).

There have been three jury trials of Cleary's suit in the Municipal Court of Chicago. In the first, there was on June 29, 1934 a verdict of $150,844.50. (Tr. 51); in the second on February 19, 1940, a verdict of $110,000 (Tr. 99); and in the third on February 20, 1946, a verdict of $209,000, (Tr. 170).

In the first case the trial judge entered judgment for the Trust Company, notwithstanding the verdict. Cleary appealed to the Appellate Court, which reversed the judgment and ordered the cause remanded for further trial, (*Chicago Title and Trust Company* v. *Cleary*, 286 Ill. App. 97 (1936)).

In the second case an appeal was taken by the Trust Company; the judgment of the Municipal Court was reversed for new trial conditioned on the trial court's bas-

ing the trial "on the fact that pages 1 and 3 of the disputed document are carbon copies of pages 1 and 3 of the November 21st agreement", (*Chicago Title and Trust Company* v. *Cleary*, 319 Ill. App. 83, 90 (1943)). The document at issue was an escrow of November 26, 1927, with an addition of Cleary's rights on page 2, and no changes on pages 1 and 3; and the carbon copies of these pages may have been of either date and identical. The instruction of the Appellate Court was followed, and the trial judge stated to counsel, in the absence of the jury:

> "Far be it from me to disagree with the Appellate Court, but assuming for the purpose of the arguments that this Trust Co., in order to save the time of their stenographers, used pages one and—carbon copies of pages one and three of the escrow agreement of November 21st and inserted page two, how in the world could the customer, could the escrowee or the—how could Cleary or anybody else prove that they did exactly that." (Tr. 913).

In the third case an appeal was taken to the Appellate Court by the Trust Company, and the judgment was reversed without remandment for further trial. The opinion in this case was rendered on May 26, 1948 and was reserved from publication, but appears in full in the third volume of the Transcript. The officially filed abstract says that the "evidence required conclusion as matter of law that defendant (Cleary) knew of delivery of bonds and by his conduct ratified delivery," (*Chicago Title and Trust Company* v. *Cleary*, 334 Ill. App. 397 (1948)).

In its third opinion the Appellate Court abandoned all consideration of alleged invalidity of the altered escrow of November 26, 1927, specifically defining Cleary's now admitted rights. The opinion relies completely upon the claim that evidence of Cleary's activity and relationship

as to other matters in the transaction must establish that "reasonable men would come to no other conclusion than that Cleary must have known of and approved the delivery of the bonds even if he did not know precisely when delivery was to be made."

The opinion that Cleary by other transactions consented to the probable loss of his investment through delivery of the bonds by the Trust Company is not in accord with the undenied fact that Cleary served a notice upon the Trust Company ordering that the bonds be held, when he heard that they were likely to be delivered. (Tr. 987-988; 361; 370; 390-391).

Cleary applied to the Appellate Court for Leave to Appeal to the Supreme Court of Illinois on the Ground of Importance, and this motion was denied, (Tr. 1171-1178).

Cleary later sought by writ of error to obtain a review of the Appellate Court by the Supreme Court of Illinois. but a motion by the Trust Company to dismiss writ of error was sustained by the Supreme Court of Illinois on September 15, 1948, and a motion by Cleary for reconsideration of the order dismissing writ of error was denied on September 22, 1948. This will receive full later consideration.

The Appellate Court of Illinois is an intermediate court of review, which does not consider constitutional issues unless they arise in that court. This limit upon jurisdiction is recognized by this Court. *Parker* v. *Illinois*, 333 U. S. 571; 68 S. Ct. 708 (1948). The Appellate Court for the First District has three divisions of three judges each, the additional one being termed branches by statute; and the First Division has authority to assign cases (Ill. Revised Statutes, Ch. 37, Sec. 45).

The present case was assigned to the Third Division, which also had the case assigned to it on the first and second appeals. Two judges who were members at the time of the second appeal were also members at the time of assignment for the third appeal. At the second appeal one of these members had expressed himself that Cleary had no case, and that the case should be dismissed.

On Cleary's behalf a verified motion was made for reassignment of the case. This was opposed by the Trust Company on the ground that:

> "Two members of the Third Division are already familiar with the facts in this case and its history in the courts. It would unduly burden the judges of another division to require them to become familiar with the complexities and long history of this case and would also increase the labors of counsel in presenting the issues." (Tr. 1167; 1169).

The motion for reassignment was denied, (Tr. 1170), although it was possible for the court to make such a reassignment. The opinion in the third appeal was written by the member of the Court who had written the opinion in the second appeal—the second appeal dealing with the character of the type-written escrow; the third abandoning this issue and that as to forgery of page 2 of the escrow in favor of one recognizing the escrow and finding that Cleary had authorized the delivery of the bonds.

Cleary's motion necessarily raised the question of reassignment in the Appellate Court for the first time. That the refusal to make the reassignment violated due process of law under the Fourteenth Amendment was stated to the Appellate Court in an application to that court for leave to appeal to the Illinois Supreme Court on the ground of importance (Tr. 1176); and the violation of due process of law is asserted in the assignment of errors presented

to the Supreme Court of Illinois in the presentation of a writ of error to that Court (Tr. 1179).

This is the issue upon which certiorari is sought in this Court.

This Court Has Jurisdiction.

The issue of due process of law under the Fourteenth Amendment presents itself in this case with respect to a motion presented to the Illinois Appellate Court that the case be reassigned to a division of that Court whose members had not previously participated or established their views in the case. The Appellate Court refused to make a reassignment, and the Supreme Court of Illinois dismissed a writ of error sought by Cleary to determine both federal and state issues of the case.

The motion for reassignment in the Appellate Court was made on September 19, 1946, and denied September 23, 1946 (Tr. 1167-1170). The opinion of the division of the Appellate Court to which assignment was made is not published but is printed in full in volume 3 of the transcript. An order dismissing Cleary's writ of error was allowed by the Supreme Court of Illinois, on motion of the Trust Company, on September 15, 1948, and a motion for reconsideration of the order was denied on September 22, 1948.

A writ of error was sought by Cleary from the Supreme Court of Illinois. A motion by the Trust Company to dismiss the writ of error was granted. No reason was expressed by the Court, and it is therefore necessary to indicate the reasons that were expressed in the Trust Company's motion. They were: (1) a claim that writ of error

did not apply in this case, and (2) a claim that action was not taken with sufficient promptness. They appear in the third volume of the transcript.

(1) This case is one of a constitutional question arising in an Appellate Court. Where the validity of a statute is involved, the constitution of Illinois authorizes writs of error to the Supreme Court of Illinois. (Constitution of Ill. Art. VI, sec. 11).

In *Hallberg* v. *Goldblatt Bros.*, 363 Ill. 25 (1936), page 29, the Court said:

> "We have also held that the judgment of the Appellate Court on a constitutional question which has been raised there for the first time was subject to review by writ of error in this Court."

This opinion has been cited with approval, or its principle approved, in *Cornell* v. *Board of Education*, 366 Ill. p. 255; *Cuneo* v. *City of Chicago*, 372 Ill. p. 476; *Merlo* v. *Public Service Co.*, 381 Ill. p. 308; and *Goodrich* v. *Sprague*, 385 Ill. 200 (1944), p. 209.

With respect to the present case, not only did there arise in the Appellate Court both a federal and a state constitutional issue of due process of law in the assignment of the case, but also the issue of a violation of the state constitutional right of trial by jury (Ill. Constitution, Art. II, sec. 5) in that the Appellate Court's opinion resorted to a weighing of evidence which was proper for the jury.

If writ of error as a matter of right does not exist from the state supreme to the Appellate Court when federal constitutional issues arise in the Appellate Court, review by the Illinois Supreme Court in such a case would rest upon the discretion of the Supreme Court of Illinois in granting a petition for leave to appeal; and if the discretion were not exercised (as is most usually the case with

such petitions) the Appellate Court would become the highest court of the state for either appeal or certiorari. This has not been intended by the Supreme Court of Illinois.

The order of the Supreme Court of Illinois dismissing Cleary's writ of error in the present case, or the same principle applied elsewhere, will materially interfere with the bringing of a federal constitutional issue to this Court, if it involved such an issue presenting itself in an intermediate court of review without involving the validity of a statute. In the present case there can be no doubt of the validity of a statute providing for the assignment of cases, but there may be serious problems in the making of assignments.

(2) The claim by the Trust Company that Cleary did not act in time is based upon the fact that the Illinois Civil Practice Act, which came into effect on January 1, 1934, provided by section 75 (Ill. Rev. Stats. Ch. 110, sec. 199) that a petition for leave to appeal be made within 40 days after the judgment of the Appellate Court shall become final, this involving ten additional days for filing a petition for rehearing. This presents again a question as to writ of error.

Shortly before the coming into effect of the Illinois Civil Practice Act, the Supreme Court of Illinois adopted rules to come into effect at the same time. Rule 62 reads as follows:

> "The process on a writ of error shall be a scire facias to hear errors, issued on the application of the plaintiff in error to the Clerk upon the filing of the transcript of record, directed to the sheriff or other officer of the proper county, commanding him to summon the defendant in error to appear in court and show cause, if any he have, why the judgment or decree mentioned in the writ of error should not be reversed. If the

scire facias be not returned executed, successive writs may issue without an order of court. If the application for the scire facias shall be made on or before 20 days before the first day of the succeeding term of the court, then the scire facias shall be made returnable on the first day of such succeeding term; but if the application is made less than 20 days before the first day of the succeeding term, then the scire facias shall be made returnable on the first day of the second succeeding term."

Scire facias, accompanied by filing of the transcript of record, initiates the proceeding. Transcript of record was filed July 20, 1948 scire facias was issued on that day, was served promptly, and was filed with the Clerk of the Illinois Supreme Court on July 29, 1948. The succeeding term of that Court began on September 13, 1948. Copies of the abstract of record were served upon the Trust Company, and were filed with the Supreme Court on August 20, 1948, as were the briefs and arguments on August 21, because Rule 41 requires filing 20 days before the beginning of the next term, if the case may be taken for that term.

The Supreme Court of Illinois having given no reason for its action, and no reasons having been established by the Trust Company's motion, its action should be regarded as a final judgment "rendered by the highest court of a state in which a decision could be had," (Title 28, United States Code, sec. 1257). Otherwise it may be regarded as a judgment of the Appellate Court held by the state Supreme Court to be the highest court in which a decision could be had. In either case certiorari may issue to the Illinois Supreme Court, for its action is involved.

The action of the Appellate Court in refusing reassignment of the case is violative of due process of law under the Fourteenth Amendment. This violation is sustained by

the Supreme Court of Illinois whose order denied review without regard to the rules and principles established by that Court, and whose assumption of discretion under the conditions of this case would prevent the appeal of the issue to this Court.

The order of the Supreme Court of Illinois dismissing petitioner's writ of error was entered on September 15, 1948; and a motion by petitioner for reconsideration of the order was denied by that court on September 22, 1948.

The Question Presented.

The only question presented to this Court is that as to whether due process of law under the Foureenth Amendment is violated by the refusal of an intermediate state court of review to reassign a case to a division of that court whose members had not previously participated or established their views in the case.

Reasons Relied On For Allowance Of Writ.

A substantial federal question presents itself with respect to a constitutional duty of a state court to assign to the determination of a case members who had not already participated in or established their views in the case, such members being available for such assignment.

Respectfully submitted,

WALTER F. DODD,
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IN THE

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OCTOBER TERM, 1948

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WILLIAM J. CLEARY,

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CHICAGO TITLE AND TRUST COMPANY,
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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions Below.

With respect to the third review of the case, which is here at issue, there are no officially published reports. The opinion of the Appellate Court is printed in full in volume 3 of the Transcript. An official summary in several lines, with a statement that the opinion is not to be published in full, is found in 334 Ill. App. 397.

No statements were made by the Supreme Court of Illinois with respect to its allowing of the Trust Company's motion to dismiss Cleary's writ of error nor with respect to its denial of the motion for reconsideration of the order.

With respect to the motion for reassignment of the case to another division of the Appellate Court in the third review here at issue, the case of *Chicago Title and Trust Company* v. *Cleary*, 319 Ill. App. 83 (1943) on second review is of importance.

Jurisdiction.

Due process of law under the Fourteenth Amendment is involved in the refusal of an intermediate state court of review to reassign a case to a division of that court whose members had not previously participated or established their views in the case. This Court has considered no case of this character, in which other divisions of such a court were available for such assignment, and a motion was made for reassignment.

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257.

The order of the Supreme Court of Illinois to dismiss Cleary's writ of error in that Court was entered on September 15, 1948, and a motion for reconsideration of that order (in the nature of a petition for rehearing) was denied on September 22, 1948. With reference to these matters no statements of opinion or of reasons therefor were made by the Supreme Court of Illinois.

STATEMENT OF THE CASE.

This case does not involve issues of fact except as such facts relate to a refusal to reassign a case on review, where a reassignment was easily possible, and those to whom the reassignment might be made would have had no previous established views or contact with the case. The action involved is that of the Appellate Court for the Third Division of Illinois (Tr. 1167-1170), which denied a motion for reassignment; and the dismissal by the Supreme Court of Illinois of a writ of error sought from that Court to determine the validity of a refusal to reassign the case under the circumstances here indicated.

Errors Relied Upon.

Petitioner assigns as error and as violative of the Fourteenth Amendment the refusal to reassign a case to judges who were available and who had not previously participated or established their views in the case, such reassignment having been asked by petitioner (Tr. 1167); the reassignment having been refused by the Illinois Appellate Court for the First District, and the action of the Appellate Court having in fact been approved by the Supreme Court of Illinois by its entry of an order dismissing writ of error to the Appellate Court involving the validity under the Fourteenth Amendment of such refusal of reassignment.

ARGUMENT.

Due process of law under the Fourteenth Amendment requires the reassignment of a case when judges have previously participated or established their views in a case; other judges are available; and a motion is made for such reassignment.

In opposing a reassignment the Trust Company correctly says that: "Two members of the Third Division are already familiar with the facts in this case and its history in the courts", (Tr. 1169). One member who was the presiding justice at the time of the second review made a statement in the previous review of this case, which is found in the case of *Chicago Title and Trust Company* v. *Cleary*, 319 Ill. App. 83 (Opinion filed May 5, 1943). Dissenting in part, he said:

> "In my opinion Mr. Cleary has not made out a case and judgment should be entered for the Chicago Title and Trust Company. He does not have a cause of action and further time and money should not be consumed in fruitless litigation."

In that case a judgment in favor of Cleary was reversed and remanded, the reversal being on the ground that there was uncertainty as to whether pages 1 and 3 of the disputed escrow of November 26, 1927, were carbon copies of pages 1 and 3 of the November 21 escrow, although page 2 was really the part of the escrow in litigation. On the third retrial, the judgment of the trial court, based on a jury verdict, is based on substantially the same evidence, and involves the same issues. This is substantially the

view expressed by the Trust Company, and quoted above.

In accordance with an established policy, the *Cleary* case was for the third time assigned to the Third Division of the Appellate Court on September 12, 1946. On his behalf a motion was made to reassign the case. The motion was denied (Tr. 1167-1170).

The opinion of the Appellate Court in the second appeal was based on the escrow, and remanded the case for new trial on the ground that there was confusion as to the time when the carbon copy of page 2 of the escrow was made, although the contents of page 2 were not in contest (319 Ill. App. 83). The opinion on the third appeal, here at issue, was not officially published but is fully printed in volume 3 of the Transcript. The issue as to the escrow having been met in the third trial, although it has no substantial relevancy, the Appellate Court, on third appeal, abandoned reliance upon the escrow, and adopted the view previously expressed by one of its members that judgment should be for the Trust Company without further trial, basing this view on the ground that Cleary had voluntarily authorized the delivery of his $100,000 in bonds, such delivery occasioning his loss.

In conclusion the opinion in the third appeal said:

> "We believe that upon the evidence on this issue, reasonable men would come to no other conclusion than that Cleary must have known of and approved the delivery of the bonds even if he did not know precisely when delivery was to be made. We believe, therefore, that the trial court should have taken the case from the jury."

This belief may have been affected by previous familiarity with the case but it was not affected by the fact that on November 28, 1927, Cleary served on the Trust Com-

pany a notice that it was not to deliver the bonds (Tr. 987; 361; 370; 390-391; 582); and that the Trust Company delivered the bonds on November 30, 1927 (Tr. 980).

The constitution of Illinois in providing for the creation of Appellate Courts requires that "No judge shall sit in review upon cases decided by him," (Constitution, Art. VI, section 11). In Ilinois, Appellate Courts are held by judges of the circuit court, and the constitutional restriction is primarily intended to forbid hearing on appeal by a judge who tried the case below; but the present case involves the hearing and determination of "an appeal from the decision of a case or issue tried by him." The principle is one supported by the constitution of Illinois and by the Fourteenth Amendment.

Title 28, United States Code, section 47, provides that: "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." A disability equally or more important is presented with respect to a judge who by participation in a prior review has reached definite conclusions, and in a case where other divisions of the reviewing court are readily available.

In *Provident Savings Life Insurance Society* v. *King*, 216 Ill. 416 (1905) P. 418, Mr. Chief Justice Cartwright quoted the above provision of the constitution of Illinois, and said:

> "In 1897 the Branch Appellate Court for the First District was constituted, to which the Appellate Court of that district may assign cases for hearing and decision. It is manifest that the constitution and law contemplate a review by a court consisting of three justices wherever it is possible, and in the First District there may be such a review in every case. The discretion committed to the Appelate Court should be exercised in accordance with the intent of the law and

> in the interest of parties, so that they may have the benefit of the judgment of three justices and not be concluded as to the facts without a decision upon them."

This statement specifically applies to a judge who is disqualified by having decided a case in the trial court. But the principle which it states equally applies to a judge who disqualifies himself by having reached a conclusion in hearing a case on review. The statement recently made by Mr. Justice Thompson in *Holmstedt* v. *Holmstedt,* 383 Ill. 290 (1943), pp. 294-295, applies to the present case:

> "It was the duty of the court as soon as he discerned within his own mind any feeling of opposition to a pronounced public policy of the State which might prejudice him for or against either party to the litigation, promptly and of his own motion, to disqualify himself and have the case reassigned."
>
> "This court has said that the spirit of our laws demands that every case shall be fairly and impartially tried, and no judge should think of presiding in a case in which his good faith in so doing is open to such serious question as that presented by this record (*People* v. *Scott,* 326 Ill. 327)."

The Appellate Court of the First District having made the assignment of the case to the Third Division, and having refused to make a reassignment, the error is one of the Appellate Court and not one of the judge who was required to serve in that Division.

In the case of *Leonard* v. *Willcox,* 101 Vt. 195 (1928), p. 219, the Court said:

> "A litigant ought not to be compelled to submit to a judge who has already confessedly prejudiced himself, and who is candid enough to announce his decision in advance, and his serious doubt that he would do otherwise and adhere to it, no matter what the evidence might be."

In *King* v. *Grace*, 293 Mass. 244 (1836) the Supreme Judicial Court of Massachusetts speaks in high praise of Article 29 of the State's Declaration of Rights, which announces that:

> "It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will permit."

This Court said in *Mooney* v. *Holohan*, 294 U. S. 103 (1935), 112, with respect to the application of due process:

> "That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions."

The present case is not like *Tumey* v. *Ohio*, 273 U. S. 510 (1927) in which a judge was to receive compensation only by means of convicting accused parties. Here there was a possibility of established views, and there were others to whom the assignment could be made; and here also was a motion for reassignment.

The United States Code, Title 28, section 144, provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

Under this statute another judge is available, as were other judges in the present case, and the development of some prejudice or of some favoritism is characteristic of humans.

In the recent case of *Dotson* v. *Burchett,* 301 Ky., 28, 190 S. W. 2d 697; 162 A. L. R. 636 (1945), the court properly said that any doubt of qualification "should be resolved in favor of a party questioning it, bona fide, and upon grounds having substance and significance." This standard was not met on behalf of Cleary.

Respectfully submitted,

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CHICAGO TITLE AND TRUST COMPANY,
a corporation,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARY TO THE SUPREME COURT OF ILLINOIS.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARY TO THE SUPREME COURT OF ILLINOIS.

Alleged Error in Petitioner's Summary of the Case.

Respondent makes no objection to Petitioner's statements of fact. However, this case being one dealing with an intermediate court of review, with three divisions, and the Third Division being the one from which transfer of the case was sought, Respondent admits that Petitioner

states that the First Division assigns cases, but claims that by implication petitioner indicates that his motion was made to and denied by the Third Division. (Opposing Brief, p. 1). Petitioner stated in as clear language as is possible that the First Division had the authority to assign cases; that the case was assigned to the Third Division; and that a motion for reassignment was denied. Such motion was necessarily made to the First Division (Trans. Vol. III, p. 43). Respondent's statement is merely an attempt at confusion.

The Issues Presented By This Petition.

(1) There is an issue of procedural due process of law under the Fourteenth Amendment, presented for the first time to this Court,

(2) The Supreme Court of Illinois prevented the consideration of that issue;

(3) The action of the Supreme Court of Illinois made that of the Appellate Court, an intermediate state court of review, controlling; and if the federal constitutional issue is to be determined, it may be upon the basis of either the action of the state Supreme Court in refusing consideration; or upon the finality of action by the Appellate Court which results from inaction of the State Supreme Court.

There is an Issue Under the Fourteenth Amendment.

The petition in this case shows without denial that the Third Division of the Appellate Court to which this case was assigned had two members, one of whom was of opinion that Cleary had no case, and the other of whom wrote the opinion in the previous second review of the case. A reading of that opinion and of the one here at issue is of importance. (*Chicago Title and Trust Company* v. *Cleary*, 319

Ill. App. 83; Transcript, Vol. III, p. 5). The expression by one of the judges that Cleary had no case was previously quoted (Petition, p. 14). The Respondent's statement (previously quoted) was that the two members of the Court should serve again because they "are already familiar with the facts in this case and its history in the courts." From the standpoint of Respondent it was even more important that points of view were already reached. It is true that dishonesty and unfairness were not charged in the affidavit supporting the motion for transfer of the case (Transcript, Vol. II, p. 1168) because of the fact that such judges did not make the assignment to themselves, even though they may have had established views in the case.

Petitioner called attention to the fact that the case of *Tumey* v. *Ohio,* 273 U. S. 510 does not apply to this case (Petition, p. 18). Respondent alleges that Petitioner relies upon the *Tumey* case, and itself relies upon a quotation from the recent case of *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683 (1948) that "it would not be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law." Respondent relies upon this and upon cases suporting this view. (Respondent's Brief, p. 4). Petitioner agrees with this view, but asks this Court if it would take the same position as to a judge who had previously expressed an opinion that one of the parties had no cause of action (Petitioner's Brief, 14), under the facts of the case. Respondent seeks to meet this situation by saying that the judge merely expressed a view of the law, but his expression went far beyond this (Opposing Brief, p. 3).

This issue presented itself in the Appellate Court for the first time.

The Supreme Court of Illinois Prevented the Consideration of This Issue.

That this Court normally follows the highest state court in its construction of state constitution, state statute and rules of state courts, is well established, and is not subject to attack by petitioner. This does not mean, however, that a construction or application thereof may be employed to defeat a right under the constitution of the United States.

The federal constitutional issue rose for the first time in the Appellate Court. If the Supreme Court of the State had jurisdiction of the matter, there was a right and a duty to seek determination by that Court before applying to this Court. Two methods of review are provided: (1) a petition for leave to appeal and (2) writ of error. One (petition for leave to appeal) is discretionary and infrequently granted; the other a matter of right if the issue is in the case. There being a constitutional issue first arising in the Appellate Court, writ of error was sought within the time specified and in accordance with a rule of the Court which is found on pages 8-9 of the Petition. There is no claim of violation of this rule, although it was found desirable by Respondent to make a false statement under oath that Petitioner's abstract of record erroneously specified the date of issuance of writ of error. The affidavit and the file of the Clerk of the Supreme Court of Illinois do not agree (Transcript, Vol. III, pp. 3; 41; 50).

Writ of error, if authorized, was filed within proper time. A motion to dismiss was filed by Respondent, on the grounds that writs of error did not apply and that filing was not within the time required for a petition for leave to appeal. Without specifying the ground therefor, the Supreme Court of Illinois granted the motion and dismissed the writ of errer (Transcript, Vol. III, pp. 46-47).

The primary ground relied upon by Respondent is that writ of error did not apply to a federal constitutional issue arising in the Appellate Court unless it involved the validity of an Illinois statute. Petitioner cited several cases which he regards as contrary to this view (Petition, 7). Respondent says that "the term 'constitutional question' as used in those cases refers only to the validity of an illinois statute." (Respondent's Brief, 12). It is for this Court to determine the meaning of the following quotation from *Hallberg* v. *Goldblatt Bros.*, 363 Ill. 25, the case which appears to have been most quoted and most relied upon by Respondent:

> "But we held that this court's jurisdiction of cases involving the validity of statute is conferred by section 11 of article 6 of the constitution and not by statute. *We also held* that the judgment of the Appellate Court on a constitutional question which had been raised there for the first time was subject to writ of error in this court." (p. 29, italics added).

The words "also held" would normally be construed to mean something in addition to statutes.

In the case of *Dinoffria* v. *International Brotherhood*, 399 Ill. 300 (1948), a case on writ of error and not involving the validity of a statute, the Illinois Supreme Court said, at page 307:

> "The right of this court to review the constitutional question first arising when the judgment of the Appellate Court is entered is well settled, even though the questions arising thereon are not raised in that court."

The Supreme Court of Illinois does not obtain this jurisdiction from the state constitution, but from the statutes as it has construed them, and the forty-day period is in

terms limited to petitions for leave to appeal, with the time required for writ of error provided by a rule which is printed on pp. 8-9 of the Petition. There is no denial of Petitioner's compliance with the requirements of this rule. There can be no doubt of the jurisdiction of the Illinois Supreme Court, and its dismissal of writ of error in this case can only be regarded as a final disposition of the case which lays the basis for a writ of certiorari from this Court.

All requirements of court rules with respect to writ of error were met by petitioner. The Respondent says that the "petitioner not having availed himself of a review of the alleged merits of his cause by the Supreme Court of Illinois, he has no standing in this court." (Respondent's Brief, 12). But the Supreme Court of Illinois did not permit petitioner to avail himself of a review of merits of his case. It rejected a writ of error which complied with the rules of that procedure, and which involved constitutional issues specifically within jurisdiction under its decisions.

Respondent (pages 10-11) says that in ruling on the motion to dismiss the writ of error the Supreme Court of Illinois construed the constitution, statute and the pertinent rules of that Court. Petitioner stated (page 9) and repeats that no such construction is found in the record unless Respondent accepts its motion as construction by the Court. The order of the court does not comply with Respondent's statement (Transcript, Vol. III, pp. 46-47). The order does not in any manner overrule, limit or criticize decisions rendered on the matter, and is in terms an order alone, occupying about one-third of a page.

With Denial of a Right to Review by the State Supreme Court, a Review of This Case by This Court Must Rest Upon the Action of the Appellate Court and upon the Refusal of the State Supreme Court to Review That Action.

Respondent claims that the only review by the State Supreme Court of a federal constitutional issue arising in the Appellate Court is by petition for leave to appeal. No right of review exists under the petition for leave to appeal, which lies completely in the discretion of the court; and, with this condition existing, this Court should entertain a direct application for review of the Appellate Court. Since the opinion of Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 265 (1821), in which the Quarterly Session Court of the borough of Norfolk was the highest court having jurisdiction of the case, this court has entertained review of the highest state court having jurisdiction, even though it may not be the state court of highest jurisdiction.

State judicial procedure is not alone involved when so construed as to permit the state supreme Court to deny consideration of a federal constitutional issue first raised in an intermediate state court. The issue becomes a federal constitutional issue, and there is a constitutional right to seek the opinion of this Court upon such an issue.

If a federal constitutional issue may be raised in an Illinois Appellate Court, but not carried of right to the Illinois Supreme Court, it must be possible to carry it from the Appellate Court to this Court, or there would be a material restriction upon this Court's jurisdiction and upon its construction of the Constitution of the United States.

It cannot be denied: (a) That a question under the Constitution of the United States presented itself to the Appellate Court; (b) nor can it be denied that Respondent claims that the Supreme Court of Illinois had full authority to refuse, and refused to consider that issue; (c) nor can it be denied that action of the Supreme Court of Illinois made the Appellate Court in fact the court of final jurisdiction.

This case involves an important constitutional issue not before presented to this Court; and, if the Supreme Court of Illinois takes the position that review may be had only at its discretion upon a petition for leave to appeal, it will have full authority to exercise that discretion in such a manner as to avoid a determination of the issue, both state and federal.

Respectfully submitted,

WALTER F. DODD,
Attorney for Petitioner.

JOHN A. BROWN,
JOHN O'C. FITZ GERALD,
Of Counsel.

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FILED
JAN 10 1949
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 460

WILLIAM J. CLEARY,
Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY,
A CORPORATION,
Respondent.

OPPOSING BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

JOSEPH B. FLEMING,
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THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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OPPOSING BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

CORRECTION OF PETITIONER'S SUMMARY OF THE CASE.

Petitioner is correct in stating that under the Illinois statute the First Division of the Appellate Court has authority to assign cases (Pet. 4). It appears, however, from the petition by implication that the Third Division denied petitioner's motion for a reassignment of the cause to another division. Petitioner's motion in that court for a reassignment of the cause was not passed on by the Third Division to which the case had been assigned. That motion was denied by the First Division which presided in none of the three appeals (Trans. 3, p. 43 fol. 47).

Under the title, "The question presented," the petitioner relies solely, as a basis for review by this court, on the refusal of the Appellate Court to reassign the cause to another division of that court. This statement is substantially repeated under the heading, "Reasons relied on for allowance of writ." As required by Rule 38(2) of this court, it is properly and will be treated as the only ground in issue (Pet. 10).

SUMMARY OF ARGUMENT.

I.

The Question of Due Process, Which Is the Only Point Petitioner Seeks to Raise, Is Not Real and Substantial.

II.

The Review Which Petitioner Seeks of the Action of the Illinois Supreme Court, Dismissing His Writ of Error, Presents No Federal Question.

(1) The Supreme Court of the United States has uniformly held that it is bound by the construction the State Court gives to the State Constitution and State statutes.

(2) The Supreme Court of the United States has uniformly held that it rests with each state to prescribe the jurisdiction of its appellate courts and the mode and time for invoking their jurisdiction.

(3) The mode of review of the Appellate Court judgment prescribed by state law was by petition for leave to appeal in the Supreme Court of Illinois. Petitioner did not avail of this. He was not justified in failing thus to seek to engage the State Supreme Court's jurisdiction by the fact that that court had discretion to allow or deny such a petition.

(4) Petitioner failed to exhaust available remedies in the State Supreme Court as he must before resorting to the Supreme Court of the United States.

ARGUMENT.

I.

The Question of Due Process, Which Is the Only Point Petitioner Seeks to Raise, Is Not Real and Substantial.

In order to invoke the jurisdiction of this court it is essential, at the outset, that the federal question which petitioner seeks to raise be one which is real and substantial. *Consolidated Turnpike* v. *Norfolk, etc. Ry. Co.* (1913), 228 U. S. 596, 599-600. Here the petition for certiorari fails to meet that essential requirement.

The sole question which petitioner presents (Pet., p. 10) is whether he was deprived of due process by refusal of the First Division of the Illinois Appellate Court to reassign his case to a division of that court other than the Third Division, to which it had been originally assigned by the First Division.

The only ground urged by petitioner for the reassignment was that when the cause had been before the Third Division of the Illinois Appellate Court for hearing on the former appeal, Mr. Justice Burke, one of the three justices of that division, had rendered a dissenting opinion expressing a view of the law unfavorable to petitioner's case. Justice Burke, of course, did not preside at any of the three trials had in the Municipal Court of Chicago (Trans. Vol. 1, pp. 52, 136, 189). No charge of personal prejudice was made against Justice Burke. On the contrary, the affidavit in support of petitioner's motion for reassignment affirmatively stated that *no doubt was entertained as to the honesty and fairness of Justice Burke* (Trans., Vol. 2, pp. 1167-68).

What more can be required of a judge than that he be honest and fair? The statement contained in the aforementioned affidavit concedes that, in law, Justice Burke was qualified.

The overwhelming weight of authority is that the mere fact that a judge in the discharge of his official duties expresses an opinion of the law upon the evidence before him does not constitute any bias or prejudice which will disqualify him from proceeding further in the cause. The precise point was recently passed upon in *Trade Comm'n* v. *Cement Institute* (1948), 333 U. S. 683, where this court (referring to *Tumey* v. *Ohio* (1927), 273 U. S. 510, relied on in petitioner's brief) said, commencing at page 702:

> "Neither the *Tumey* decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.
>
> "The Commission properly refused to disqualify itself."

Same effect:

Ex parte Am. Steel Barrel Co. (1913), 230 U. S. 35, 43, 44.

King v. *Grace* (1936), 293 Mass. 244, 200 N. E. 346, 348.

Kolowich v. *Wayne Circuit Judge* (1933), 264 Mich. 668, 250 N. W. 875.

Slayton v. *Commonwealth* (1946), 185 Va. 371, 38 S. E. (2d) 485, 487.

56 Am. Jur. pp. 59, 60—Title, Venue, Sec. 57.

At the outset, therefore, it is apparent that the petition for certiorari raises no real and substantial federal question of the type necessary to give this Court jurisdiction.

II.

The Review Which Petitioner Seeks of the Action of the Illinois Supreme Court, Dismissing His Writ of Error, Presents No Federal Question.

Petitioner asks to have reviewed by certiorari the judgment of the Illinois Supreme Court (Pet., p. 1). The only judgment entered by the Illinois Supreme Court in this cause[1] was its order of September 15, 1948, dismissing a writ of error by which petitioner sought review of a judgment which had been entered by the Illinois Appellate Court reversing a judgment of the Municipal Court of Chicago (Trans. 3, pp. 46-7).

That dismissal was based on the motion of the defendant in error in the Illinois Supreme Court, which motion assigned only the following grounds:

> (1) "There is no warrant or authority in law for the prosecution of a writ of error in the cause."
> (2) "This court has no jurisdiction to entertain a writ of error in this case as the proceeding was not begun within the forty days required by law."
> (3) "The writ of error may not be treated as a petition for leave to appeal under Rule 28 of the rules of this court" (Trans. 3, pp. 26-27).

The issues thus presented by the motion involved Illinois appellate *procedure*, only, and they exclude any possible Federal question. It was in pursuance of this motion that the writ of error was dismissed (Motion and grounds in support thereof, Trans. 3, pp. 26-40).

[1] Except an order entered September 22, 1948, denying a motion to reconsider its order of dismissal. Trans. 3, p. 54.

The state constitution renders a review of Appellate Court judgments by the Illinois Supreme Court by writ of error imperative in only four clearly defined cases. Article 6 of Section 11 of that constitution (Ill. Rev. Stat., 1947, p. 26) provides:

> "After the year of our Lord 1874, inferior appellate courts, of uniform organization and jurisdiction, may be created in districts formed for that purpose, to which such appeals and writs of error as the general assembly may provide may be prosecuted from circuit and other courts, and *from which appeals and writs of error shall lie to the supreme court, in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved, and in such other cases as may be provided by law.* Such appellate courts shall be held by such number of judges of the circuit courts, and at such times and places, and in such manner, as may be provided by law; but no judge shall sit in review upon cases decided by him, nor shall said judges receive any additional compensation for such services." (Italics added.)

The quoted section has been construed by the State Supreme Court. In the case of *Lake Shore and Michigan Southern Railway Co.* v. *Richards* (1894), 152 Ill. 59, 71, 38 N. E. 773, 774, that court held:

> "In four classes of cases,—that is, criminal cases, and those involving a franchise or freehold or the validity of a statute,—the legislature is prohibited from making the determination of such Appellate Courts final. In such cases appeals and writs of error must be allowed to the Supreme Court. In all other cases in which such courts are given jurisdiction by statute it is left by the constitution *discretionary with the legislature to make the judgments of those courts final, or to provide for further appeal or writ of error, as in the legislative discretion shall be deemed proper.* It necessarily follows, that since the creation and organization of the Appellate Courts *the jurisdiction of*

this court to review the final judgments of those courts, except in the four classes of cases enumerated in the constitution, is subject to the restrictions created by the legislature * * *." (Italics added.)

Same effect:

Freitag v. *Union Stock Yard & Transit Co.* (1914), 262 Ill. 551, 555, 104 N. E. 901, 902.

Kerfoot v. *Cromwell Mound Co.* (1884), 115 Ill. 502, 507, 25 N. E. 960, 961-962.

It was pointed out in the aforementioned motion to dismiss the writ of error that the case did not fall within any of the four classes of cases specified in the cited section of the state constitution as construed by the State Supreme Court (Trans. 3, p. 26).

In pursuance of that constitutional provision the Illinois legislature has, by subparagraph (2) of Section 75 of the Illinois Civil Practice Act (Ill. Rev. Stat., 1947, Chap. 110, § 199, bold face numbering) *set up the time within which and the mode whereby judgments of the Appellate Court may be reviewed.* The pertinent portions of that statute are as follows:

"(2) In all cases in which their jurisdiction is invoked pursuant to law, *except those wherein appeals are specifically required by the constitution of the State* to be allowed from the Appellate Courts to the Supreme Court, the *judgments or decrees of the Appellate Courts shall be final*, subject, however, to the following exceptions: (a) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of the opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court

the grounds of granting said appeal. (b) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court. * * *

"* * * And provided also, that application under this Act to the Supreme Court to cause it to grant leave to appeal for its review and determination shall be made *within forty days* after the judgment of the Appellate Court shall have become final, either through the denial of a petition for a rehearing or the expiration of the time within which a petition for rehearing might be filed, or the expiration of the time within which a notice of intention to file a petition for rehearing (when the filing of such notice is required by rule of the Appellate Court) might be filed; otherwise said power of the Supreme Court to review the judgment and decree of the Appellate Court *shall cease to exist.* Answers to such petitions for leave to appeal may be filed by respondent within fifteen (15) days after the expiration of the time for the filing of the petition for leave to appeal or within such further time as the Supreme Court or some Justice thereof in vacation may grant, if granted within said fifteen-day period." (Italics added.)

Rule 28 of the "Rules of Practice" of the Supreme Court of Illinois (Ill. Rev. Stat., 1947, p. 2548) provides as follows:

"The provisions of the Civil Practice Act and the rules of this Court referring to appellant and appellee shall, to the extent applicable, *include plaintiff in error and defendant in error in criminal cases and in civil cases where writ of error is preserved as a method of review.*

"If a writ of error be improvidently sued out in a case where the proper method of review is by appeal, or if appeal be improvidently employed where

> the proper method of review is by writ of error, this alone shall not be a ground for dismissal, but if the issues of the case sufficiently appear upon the record before the court of review, the case shall be considered as if the proper method of review had been employed." (Italics added.)

It was on the basis of the foregoing quoted constitutional provision, statute, and rule of court that the respondent here moved for dismissal of the writ of error sued out of the Supreme Court of Illinois. The contentions made in the argument in support of that motion may be summarized as follows:

(1) The validity of no statute was involved and, therefore, the cause was not within the purview of the quoted constitutional provision (Trans. 3, pp. 26, 28-30, 32).

(2) Under state procedure the cause was not reviewable by writ of error (Trans. 3, pp. 26, 28-30, 32).

(3) Even if the judgment of the Appellate Court were reviewable by writ of error, the Illinois Supreme Court did not acquire jurisdiction since no proceeding to review that judgment was begun within forty days after that judgment became final, as required by state practice (Trans. 3, pp. 35-39).

(4) The writ of error so filed after the expiration of forty days could not be treated as a petition for leave to appeal under Rule 28, since so to treat it would be a clear circumvention of the above quoted statute (Trans. 3, pp. 27-28, 39-41).

The plaintiff in error in the Supreme Court of Illinois (petitioner here) joined issue in his reply on the questions so raised (Trans. 3, pp. 43-46). The State Supreme Court, on September 15, 1948, passed on the motion of defendant in error (respondent here) holding that "said writ of error is not well taken," and ordering that "said writ of error be and the same is hence dismissed." The same

order stated that it was entered in pursuance of the aforesaid motion to dismiss (Trans. 3, pp. 46-47). A motion by the plaintiff in error asking the court to reconsider its action was interposed and subsequently denied. The issues presented by the motion to reconsider were the same as those presented by the original motion to dismiss (Trans. 3, pp. 48-55).

However, at page 9 the petition for certiorari states that the Supreme Court of Illinois "having given no reason for its action, and no reasons having been established by the Trust Company's [respondent here] motion, its action should be regarded as a final judgment 'rendered by the highest court of a state in which a decision could be had.'" The reasons stated in the Trust Company's motion to dismiss the writ of error are clearly set forth in the motion to dismiss, all of which concern questions of state procedure only. In fact, in petitioner's motion to reconsider the order of dismissal he shows that the ground or grounds on which the Supreme Court of Illinois acted were perfectly clear to him for he said, "*The basis of dismissal must necessarily be (1) that writ of error proceedings were not begun within proper time; or (2) that writ of error does not lie in the present case*" (Trans. 3, p. 48). These bases concern not the merits but questions of state practice.

It is therefore clear that the issues presented and passed on by the Supreme Court of Illinois involved only *state procedural questions*. There was no adjudication on the merits. No federal question was involved.

The holdings of the Supreme Court of the United States concerning its jurisdiction to review decisions of the highest courts of the several states are next in order.

(1) In ruling on the motion to dismiss the writ of error, the Supreme Court of Illinois construed the aforementioned section of the state constitution, the state

statute, and the pertinent rules of that court. The Supreme Court of the United States has uniformly held that it is bound by the construction the state court gives to the state constitution and state statutes. It is accordingly bound by the construction placed by the state court on the constitution, statute and rules herein involved and quoted above.

West v. *Louisiana* (1904), 194 U. S. 258, 261.
Hurwitz v. *North* (1926), 271 U. S. 40, 41.

(2) The motion made in the Supreme Court of Illinois to dismiss the writ of error was based on the alleged failure of the then plaintiff in error (a) to invoke the proper mode of review, and (b) to avail himself of that mode of review or of any other mode of review within the time prescribed by state practice. This court has uniformly held that it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and the time for invoking their jurisdiction, and the rules of practice to be applied in its exercise, whether federal rights are involved or not.

John v. *Paullin* (1913), 231 U. S. 583, 584.
Great Western Telegraph Co. v. *Purdy* (1896), 162 U. S. 329, 339.

(3) The mode of review of the Appellate Court judgment prescribed by the state rules of procedure was by a petition for leave to appeal addressed to the Supreme Court of Illinois and not by writ of error. This court has held that the fact that the State Supreme Court might in its discretion allow or deny such a petition for leave to appeal does not justify a petitioner in failing to engage the state court's discretion.

John v. *Paullin* (1913), 231 U. S. 583, 584 (cited *supra*).
Newman v. *Gates* (1907), 204 U. S. 89, 94.
Southern Electric Co. v. *Stoddard* (1925), 269 U. S. 186, 187.

(4) The petitioner not having availed himself of a review of the alleged merits of his cause by the Supreme Court of Illinois, he has no standing in this court. It was his obligation to exhaust all possible remedies in the State court in the manner in which the State prescribes before resort can be had to the Supreme Court of the United States.

U. S. C. A., Title 28, Sec. 344(b).
Gorman v. *Washington University* (1942), 316 U. S. 98-101.
Newman v. *Gates* (1907), 204 U. S. 89, 94.
McMaster v. *Gould* (1928), 276 U. S. 284.

Under petitioner's heading, "This Court Has Jurisdiction", he cites the case of *Hallberg* v. *Goldblatt Bros.* (1936), 363 Ill. 25, and other Illinois cases to support his claim that, under Article 6, Section 11, of the Illinois Constitution, writ of error was properly invoked as the mode of reviewing the judgment of the Appellate Court in the Supreme Court of Illinois because a constitutional question was involved (Pet., p. 7). The term "constitutional question" as used in those cases refers only to the validity of an Illinois statute. As was clearly pointed out in the motion to dismiss the writ of error in the State Supreme Court, the validity of no state statute was involved in this case (Trans. 3, pp. 32-33). Illinois cases are there cited sustaining the proposition last stated. Of course, as already shown, the State Supreme Court's construction of the State Constitution is final and not reviewable in this court. The Supreme Court of Illinois, in granting the motion to dismiss, quite evidently ruled with respondent as to this construction of the state constitution and on this question of state procedure.

The petitioner relies on Rule 62 of the Supreme Court of Illinois (Pet., p. 8). Again he raises a question of state practice. That rule was invoked by the petitioner in his

motion in the Supreme Court of Illinois for a reconsideration of its order dismissing the writ of error. That court ruled contrary to his contention (Trans. 3, p. 54). This Court has consistently considered construction by the Supreme Court of a state of its own rules of practice, binding on this Court.

It is therefore respectfully submitted that the Petition for Certiorari be denied.

Respectfully submitted,

JOSEPH B. FLEMING,
HAROLD L. REEVE,
Attorneys for Respondent.

CHARLES F. GRIMES,
WILLIAM WILSON,
Of Counsel.

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FEB 11 1949

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 460

WILLIAM J. CLEARY,
Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY,
a corporation,
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 903

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Certificate of Counsel for Petitioner.

The Counsel for Petitioner here repeat the certificate filed with this petition, that:

(1) This petition for rehearing is presented in good faith and not for delay, the Petitioner not profiting from the temporary delay; and

(2) This petition for rehearing is restricted to the position that to deny the petition for certiorari in this case defeats and restricts the jurisdiction of this Court in the construction of the constitution of the United States. The issue as to such defeat and restriction of this Court was incident to substantial grounds available to petitioner in his petition for certiorari, but was not specifically presented.

Ground of Petition for Rehearing.

There is no doubt of the existence of a Federal Constitutional issue in this case, and that the type of issue involved herein has not been previously determined by this Court.

During the year 1948, as previously indicated, the Supreme Court of Illinois unanimously stated, in a case not involving the validity of a statute, that it had jurisdiction by writ of error in a case in which a question arose in the Appellate Court, the Supreme Court of Illinois saying as to a judgment of the Appellate Court: "Such a judgment is *coram non judice* and is ineffectual for any purpose but on review thereof this Court will assume and retain jurisdiction of the cause." *Dinoffria* v. *Brotherhood*, 399 Ill. 304, 307 (1948).

Under the view of the Illinois Supreme Court, the Appellate Court had no jurisdiction of the constitutional question, though in this case it was obligated to act; and the Supreme Court of Illinois has a power and duty to assume jurisdiction in such a case. Such assumption could only be by writ of error, subject to the rules of that court with respect to writ of error. The Illinois Supreme Court did not indicate its reasons in the present case, but its action is based upon the absence of both power and duty, whereas it has alleged power and duty under such circumstances.

It is certain that there is a constitutional issue, federal in character; it is certain that the Appellate Court exercised an authority with respect to such issue; it is certain that the writ of error is the only remedy recognized by the Supreme Court of Illinois as a matter of right to transfer to that Court a judgment of the Appellate Court that is *coram non judice;* and it is also certain that the petitioner in the present case complied with the rules of that Court

as to writ of error, such rules establishing different standards of time from those provided by statute with reference to petitions for leave to appeal.

If there were a right to a review of the constitutional issues by writ of error from the Supreme Court of Illinois, it is obvious that the steps toward such a writ were subject to the writ of error rules of that Court and not to statutory restrictions upon the different procedure of petition for leave to appeal, in which the Court has a discretion in determining whether it will take jurisdiction.

A restriction to the State Supreme Court's discretion upon petitions for leave to appeal, and a denial of review by this Court in a case where a federal constitutional issue is presented through an intermediate (Appellate) Court, with review denied by the highest state court, would, in the language of Mr. Justice Rutledge, be "dovetailing federal jurisdictional limitations with state procedural ones." But the effect here would be more serious than in the case of *Parker* v. *Illinois*, 333 U. S. 571.

There is no question as to the existence of a federal constitutional issue, and of the avoidance of such issue under conditions of this case.

May the Supreme Court of Illinois restrict and defeat the construction of that issue by this Court? Such an issue may obviously arise in the intermediate (Appellate) state Court, and if, as respondent contended, a review by the Supreme Court of Illinois rests upon its discretion, the negative action of that Court through refusal of hearing would defeat the possibility of review by this Court. Writ of error by the Supreme Court of Illinois would, on the other hand, present action subject to review by this Court.

It has been the intention that this Court be the body for the construction of the Constitution of the United States,

and legislation for this purpose was enacted in 1914, the same purpose being retained in section 1257 of Title 28 of the United States Code, entitled "Judicial Code and Judiciary", effective September 1, 1948. Under the construction sought to be established in the present case, so long as the constitutional issue presents itself in the State's Appellate Court, an avoidance of review by the State Supreme Court would prevent a determination of the federal issue—the State Supreme Court having a jurisdiction to end the cause.

Reliance upon a petition for leave to appeal to the State Supreme Court would abandon any right and duty of that Court and substitute therefor a remote possibility of its reviewing the case. And the denial of review would end the case, with the constitutional issue finally applied by the Appellate Court but subject to no review because *coram non judice*—such judgment being subject only to review by writ of error which is denied by the Supreme Court of Illinois.

It is highly undesirable that a practice be established by which state courts may render final judgments in the construction of federal constitutional issues.

Respectfully submitted,

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JOHN A. BROWN,
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Of Counsel.

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FEB 21 1949

CHARLES ELMORE

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RESPONDENT'S REPLY TO PETITION FOR REHEARING.

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THE BURNHAM-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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Respondent.

RESPONDENT'S REPLY TO PETITION FOR REHEARING.

A. No Substantial Federal Question Exists in This Case.

The statement in the above heading was the initial point presented in respondent's opposing brief (pp. 3-5). The sole ground on which petitioner sought to invoke the jurisdiction of this court was the refusal by the state appellate court to reassign the cause to another division of that court. The petitioner claimed that this action was in violation of the due process clause. The cases cited by respondent in its opposing brief, particularly *Trade Comm'n* v. *Cement Institute* (1948), 333 U. S. 683, 702, 703, clearly establish that this action of the Appellate Court was not a denial of due process.

This basic point so presented by respondent is ignored in the petition for rehearing. Nevertheless, on page 2 of the petition for rehearing it is said, "There is no doubt of the existence of a Federal Constitutional issue in this case * * *." This statement is reiterated, in substance, three times, as though by repetition a federal question might be made to appear where none exists. There is no federal question in this case and, therefore, no "dovetailing federal jurisdictional limitations with state procedural ones." (Petition for Rehearing, p. 3.)

B. Even Assuming, Arguendo, That a Federal Question Was Involved, Petitioner Failed to Exhaust the Method of Review Prescribed by State Procedure, Which Failure Precludes a Review by This Court.

At page 3 of the petition for rehearing, it is said, "* * * if, as respondent contended, a review by the Supreme Court of Illinois rests upon its discretion, the negative action of that court through refusal of hearing would defeat the possibility of review by this court." The Illinois statute gives a clear, simple and direct method of review of Illinois Appellate Court judgments by the Illinois Supreme Court in civil cases through petition for leave to appeal. Ill. Rev. Stat. 1947, Ch. 110, Sec. 199. Obviously, had petitioner filed a petition for leave to appeal in the Supreme Court of Illinois within the time allowed by state practice (which he failed to do) and had that petition been denied (and had a federal question been involved) the "possibility of review" by this court would have been open to petitioner.

Such are the holdings of this court. *Minneapolis, St. Paul & Sault Ste. Marie Railway Company* v. *Rock* (1929), 279 U. S. 410; *C. & O. Ry. Co.* v. *Mihas* (1929), 280 U. S. 102. In those cases the proceeding in the Illinois Supreme

Court was by petition for certiorari under the practice then applicable. The present practice in Illinois in like cases is by petition for leave to appeal. The two methods of review are different in name only.

In the case of *Gregory* v. *McVeigh* (1874), 23 Wall. 294, this court said at page 306:

> "It has long been settled that if a cause cannot be taken to the highest court of a State, except by leave of the court itself, a refusal of the court upon proper application made to grant the leave, is equivalent to a judgment of affirmance, and is such a final judgment as may be made the basis of proceedings under the appellate jurisdiction of this court."

And this court in *Parker* v. *Illinois* (1948), 333 U. S. 571, said at page 575:

> "The channel through which the constitutional questions, raised by petitioner in his attack on the amended order, could have been taken all the way to this Court was not only clearly marked, it was also open and unobstructed."

So in the case at bar, the path to be followed by petitioner to obtain a review by the highest court of the state by petition for leave to appeal, was plainly marked by state procedure, was open and unobstructed, and he did not follow it.

It is, therefore, respectfully submitted that the petition for rehearing be denied.

Respectfully submitted,

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